This is an author-produced version of a paper accepted for publication in *Global Harmony and the Rule of Law* (Archiv für Rechts- und Sozialphilosophie - Beihefte, nr. 130).
1. Introduction

I take humans to basically strive toward a condition of peace enabling human flourishing. Yet human groups and individuals alike have an extraordinary wide range of understandings of such a condition, subject to variation in time and space. So if hope for lasting peace and joint cooperation is to emerge from rule of law or otherwise underpin global harmony, first these very concepts need to be unpacked in proper detail. Given the remarkable diversity of legal practices across societies, simply looking at our own will prove insufficient. “Global Harmony and Rule of Law” is not a topic easily addressed from the prevailing view of a single “school of thought.” Thus a premise is required.

Discourse analysis provides a valuable toolkit for investigating the prevailing lexis and avoiding the pitfalls of buzzwords. Yet these tools, that emerged in 20th century legal theory as a legacy of Wittgenstein and the linguistic turn in philosophy, were far too often reduced to just another occasion for entrenching into one’s own legal (and generally speaking, cultural) tradition.

To address the pressing issues of our day, we need to take a step further and extend our exploration. An effort has been made here to choose worldwide references from both the Eastern and Western traditions of thought to reflect a cosmopolitan culture needed to innovate thinking. The methodological choice is to combine comparative philosophy and the “empirical-analytical method.”

I aim to clarify the concept of rule of law (ROL) that appears to be equivocal and often (covertly) value-laden both in ordinary language and scholarly literature. Prima facie, the case of harmony seems different. The contemporary Chinese policies of the “harmonious society” (hexie shehui) suggest a more careful reading.

The fundamental premise of epistemology that sets the background of the present work is that abstract or theoretical language is inevitably composed by conventional terms that cannot be subjected to a judgement of truth or falsity. This, however, is not the case of the theoretical theses that claim to build on these simple or “primitive terms.” The theses need to be assessed on the ground of their consistency with the premises and in relation to their explicative scope, their capacity of grasping the phenomena they refer to.

This methodology sets out the theoretical position the paper argues for. A fruitful way of establishing a wider and deeper discussion of these crucial topics in legal theory is to listen to those who do not embrace the prevailing (and often superficial) views, regardless of the fact that – at a later stage – there might be arguments for rejecting such alternative conceptions. My claim is that a theory – intending to frame all the facts that have been thrown up in the air with our entry into the global age – would need to construe a cross-cultural and transnational concept of justice. The arguments presented here aim at demonstrating this necessity.

This paper is divided into three sections: First, we focus on rule of law. Is it a likely candidate to set the legal framework of cooperation in a globalized world? A promising start is to go beyond the consensus omnia of international declarations and shed light on the arguments of those who do not estimate that ROL enhances concord. Essentially chameleonic, it stimulates criticism of everyday practice, while its technical use proves to be far from neutral. Secondly, the concept of harmony needs better understanding: The arguments of
those who disbelieve the emancipating strength of harmony have to be addressed. In particular, we look at why Western legal tradition is so reluctant to admit “harmony” into legal discourse and examine some Chinese practices of “harmonious society.” I will draw some concluding remarks in section three on two lessons to be learnt if we want to overcome the cultural divides of the *West-östlicher Diwan* (Goethe).

2. Rule of Law: A Likely Candidate for Grounding Global Harmony?

2.1. An Implausible Consensus

Looking at the meaning that “rule of law” has acquired within a broad range of fields (legal theory, law and jurisprudence, political philosophy, political science, international relations, sociology and social theory), the first striking aspect is that it does not seem – at least any longer – to be the monopoly of narrow, technical definitions, focusing on the principles of *legality* and *impartiality*.

Historically, the appeal of ROL derives from the distinction between “empire of laws” (rule by law) and “empire of men” (rule under men). This first sense includes both *gubernaculum per leges* and *sub lege*, the latter tending to get confused with constitutionalism. Today, however, both practitioners and scholars refer to ROL as an aggregate of legal rules and institutions, but also as a variety of informal discursive practices aimed at legitimising those rules and institutions.

It is therefore almost trivial to observe that there are competing definitions of ROL, but less noticed is that it is one of the world’s most intriguing forms of *consensus omnia*, transcending left and right (embraced by both the World Social Forum and the World Bank). But what exactly are we all supposed to agree upon?

One-size-fits-all definitions can obviously be found, but they suffer from tremendously high levels of generality. Moreover, the “level of governance” concerned by ROL is indefinite: Leaving aside the *domestic analogy*, on a global scale, it is far from clear whether “ROL” is (1) a principle setting the relations between international (State) actors, therefore building on the tradition of *ius gentium* and *ius cogens* (including measures of *ius in bello* and perhaps even *ius ad bellum* theories); or rather, if (2) it imposes the primacy of what we might call “transnational human rights law” as it is often claimed to be the case within the European Union; or if (3) it denotes a *cosmopolitan* normative regime.

Once we acknowledge the need for distinctions, we find too many. The formula is not even specific in the lawyer’s lingo: The long-standing distinction between thin (or procedural) and thick (or substantive) conceptions of ROL has been debated at great length, as has the difference between rule of law, rule by law etc. At this point there is little to be gained by further restatements of these basic distinctions. However, abandoning this debate will not reduce the number of competing conceptions: *Rechtsstaat*, *État de droit*, *Estado de derecho*. «Used promiscuously, their conceptual equivalence is far from being straightforward. Their terminological differences and the ensuing well-known translation problems, epitomize the diversity of cultural contexts.» The continental civil law tradition also developed other concepts that are smeared into the Anglo-Saxon formula, including *certezza del diritto*, *sécurité juridique*, etc. We should also ask whether Chinese *fazhi* is a Far Eastern equivalent.

The great variety of *rules of law*, even within the sole Western legal tradition, risks fragmenting the concept. Is the notion doomed to implode because of historically and
culturally stratified empirical referents? Or because of the increasing complexity of contemporary legal systems? The most recent legal literature delves into innumerable normative assumptions, internally incoherent or unsystematic, considered to be prerequisites. If every legal system has developed (or intends to develop) its own ROL, we risk a regressio ad infinitum, needing always more comprehensive notions to grasp the commonalities of different standards.

Furthermore, many “working definitions” of ROL suffer from circularity: The same term appears both as definiendum and definiens. Many measurement tools construe ROL in such a way that the ends which it is meant to achieve are the elements of the definition, mudding the waters of causal explanation. Practical prescription lists and scientific literature suggest that ROL can be measured by protection of property rights or a specific form of property such as intellectual property rights or creditor rights in bankruptcy proceedings. Another widespread claim is that ROL can be measured by low crime rates or access to justice. Here, too, the definition hinges on normative goals. Yet another option for many off-the-shelf ROL toolkits is to link it to other “essentially contested concepts” of which, unsurprisingly, democracy seems to be the champion.10 This makes it even more puzzling when it is affirmed that many democracies have legal systems that fall short of ROL. «Despite a growing empirical literature, there remain serious doubts about the relationship, and often causal direction, between ROL and the ever-increasing list of goodies with which it is associated, including economic growth, poverty reduction, democratization, legal empowerment and human rights».11 The less than spectacular results of the international ROL movement have called into question the role and influence of foreign actors, as well as the assumption that the best way for the so-called developing world to achieve ROL is to base reforms on ‘international best practices’ – when not Euro-American institutions – that seldom come without strings (values and beliefs) attached to them.

Even admitting, for the sake of argument, universal agreement on our need for the ROL, we still lack a clear referent. This apparent consensus originates from the positive connotations that the expression evokes, at least since Dicey famously held British liberal constitutional civilization, defined by ROL, as opposed to the French authoritarian tradition based on administrative law. Such positive connotations have now been so embedded into the formula that it has become part of the dimension that Polanyi described as “tacit knowledge.”12 These considerations should be sufficiently convincing to justify why we need to listen to those who do not believe any lasting condition of peace can derive from ROL.13

2.2. Three Criticisms of Rule of Law

One criticism holds it to be a case of law-fare: It «has faithfully served plunder through history» and «justifies looting to the paradoxical point of being itself illegal.»14 «An early tool used by lawyers to claim special professional status as guardians of the government of laws», ROL has become «the instrumental backbone of the ideal market economy.»15 The argument is that one of the cornerstones of ROL is to secure property rights against governmental taking and guarantee contractual obligations. The line of argument points to systems where property rights are worshipped but that are still governed by ruthless and unrestricted leaders. Looking back, ROL ideology was the «key to colonial and imperial projects.»16 The terra nullius doctrine hinged on the lack of individual property—an element of natural law’s conception of ROL—and enabled “legal” acquisition of American Indian lands, deemed vacant by newcomers. International law, ius gentium and, more specifically, the ideas of ius peregrinani et degendi (transit), ius commercii (trade) and ius migrandi (migration) were conceived to
privilege Western colonizers. Not a mere technical device, ROL is rather as an instrument for hegemony (Gramsci).

Another criticism, partially in line with the previous argumentation, holds ROL to be a Western invention, but in contrast to the first line of argument it is not considered to be the hegemonic instrument of capitalism, but of “Occidentalism.”[17] «As there is a literary canon that establishes what is and what is not literature, there is also a legal canon that establishes what is and what is not law.»[18] So, the argument of “legal orientalism” is that the yardstick for what qualifies as law has been Modern Western law as responding to formal legal rationality (Weber).[19] This has led to the claim made by many Western observers that, e.g., China lacks an indigenous tradition of “law.” Classic Chinese law focused on criminal regulations and sanctions, whereas civil law is construed as the distinctive character of (true) law.

Without assessing the multiplicity of meanings that ROL has acquired in non-Western contexts (such as the Chinese)[20], what is being questioned is not a specific set of institutions that may, rightly or wrongly, be identified as ‘Western (rule of) law’. The challenge goes deeper and concerns the epistemological status of law itself.

A third criticism comes from “global constitutionalism.”[21] ROL is neither a ‘perilous transplant’ introducing lex mercatoria, nor a Trojan horse in the non-Western world. The ideal of rule of law is not questioned as much as the way it is currently practiced: Since it lacks effectiveness, it is unsatisfactory. Given that constitutionalism, at state level, implied that constitutions (foremost ‘rigid’ ones) made legislative power respect the constitution, advocates of international constitutionalism calls for such a paradigmatic change in the international arena. While previously the exclusive criterion for identifying validity was the principle of formal legality, in ‘constitutional ROL’ the principle of substantial legality is added. Following procedures is not enough to confer validity: Law needs to be consistent with the “coto vedado”[22] of constitutional norms, not at the disposal of majority rule or political will.

On the normative level, this implies that the traditional treaty-based regime of international relations should develop into a supranational legal system, containing both formal and substantial norms limiting the internal sovereignty of states. However, fundamental rights have no adequate guarantees of enforcement and there is no court subjecting domestic law to judicial review testing its consistency with global constitutional norms. Wars and misery around the planet can thus be construed as illegal, not generically unjust. Infringements of fundamental rights are due to antinomies (inconsistencies between supranational and national norms) and cases of vacuum lex (absence of guarantees logically required to confer effectiveness to fundamental rights).[23] The hiatus between what is and what ought to be does not invalidate the principles themselves, rather, from the normative perspective of global constitutionalism, the lack of effectiveness of fundamental rights, the absence of overarching judicial institutions, etc. are all good arguments for claiming that ROL, foremost in its relation to the principle of formal legality, is necessary yet insufficient in providing for peace.

There are several ways to refute these three arguments, but they show that ROL is no ‘magic bullet’ and no likely candidate for building global concord. The banner of rule of law was used as a synonym for judicial reform, often narrowed-down to equal an independent judiciary. «When this approach came up short, the scope of reform was expanded politically to include democracy, civil and political rights, freedom as an end of development, a robust civil society, increased political participation, and now the new governance of the post-regulatory state with its emphasis on (…) private-public hybrids.»[24] This conceptual overstretch explains why ROL is not likely to promote global concord.
3. Harmony: A Source of Cultural Antagonism?

Can harmony condense the quest for human flourishing? *Prima facie,* ‘harmony’ has much higher odds for being a building block (or at least a stepping stone) for erecting a condition of lasting peace on the planet: Hardly a key phrase of international politics, it is not liable to Euro-centrism.

3.1. A Common Concept of Harmonious Order

The concept has figured prominently in both Chinese and Western philosophical traditions, indicating concord, equilibrium between forces resulting in peace, in contrast to disorder (*chaos* in the Greek tradition and *luan* in the Chinese tradition). A sweeping look at the ancient Chinese and Greco-Roman classics confirms this.

The major classical Chinese schools of thought — Confucian, Taoist, Legalist, and Buddhist — consider *he/hexie* in the general meaning of “getting along” as a fundamental value. The saying attributed to Kongzi, ‘harmony is most precious – peace is to be cherished’ (*hé wéi guì*), clearly frames the homonymous character of harmony and peace. In the Western hemisphere, ‘harmony’ — from the Greek term for ‘joint’ or ‘shoulder’ — has a long-standing tradition stemming from the pre-Socratic philosophers. In Greek, ἁρμονία had a generic meaning of ‘order’ but, in time, the word assumed the significance of ‘musical order’. Later, the Romans literally transposed the term into *concordia*.

The order emerging from harmony is a composition of differences and not merely a sum of unities. This is particularly clear in the Heraclitean theory of *kalliste harmônia* as equilibrium between opposites (Diels-Kranz B8, B60). This key understanding returns in Qian Xun’s idea of *harmony without uniformity* (*hé ér bùtóng*) opposed to the unification of thought (*pensée unique*). Hence, ‘order’ is a crucial component of ‘harmony’ but so is also difference. On a social level, harmony is a relational concept and hints to concert or absence of contradiction in relationships between individuals and/or groups. Contrarily to ROL, we do not deal with an essentially contested concept: its structure (as a spontaneous or self-imposed order, a string of dissimilar components, etc.) is not seriously questioned. In other words, what is undisputed is the meaning of the term; I am not implying that the organisations that have historically been described hereby have not been challenged, or that the possibility of an ultimate harmonious order has not been doubted. Well captured in Plinius’ classic formula *concordia discors*, the concept is nonetheless perfectly understandable in the East as in the West.

3.2. A Clear Referent

The ‘harmonious society’ is of particular interest to us because of China’s significant role and population size in the globalized era. It figures prominently as 和谐社会 (*hexie shehui*) or ‘harmonious society’ in public debate and government ideology of the Hu Jintao administration. In its broad meaning the formula refers to the reduction of social inequalities, growing employment, improved equity and justice procedures, eradication of corruption, preservation of security and order, protection of environment.

In China’s era of ‘reform and opening-up’ (*kaifang gaige*) initiated by Deng Xiaoping, the introduction of new concepts into official discourse has included the «three
represents» (sange daibiao) and «scientific development» (kexue fazhan guan) grounded in the principle of dangnei hexie (harmony within the Party), «socialist rule of law» (shehui zhuyi fazhi guojia) and, most importantly, the «harmonious society» (shehui zhuyi hexie shehui). These notions form the road map to achieve a «moderately prosperous society» (xiaokang) by 2020.

The CCP’s commitment to ‘building a harmonious society’ was officially announced in 2002. Adopting a global perspective, Wen Jiabao declared in 2006: «We call for and promote the building of a harmonious world, which is in line with the trend of the times in the world today and reflects the common interests and aspirations of people across the globe.» At the end of the CCP’s 6th session of the 16th Central Committee, the Resolution on the Main Aspects of the Construction of a Harmonious Socialist Society was set at the centre of the integrated plan of the CCP for the 21st century, and hexie shehui was added to the basic line in its constitution in 2007.

«It is under the leadership of Hu, who in 2005 formulated what is known as the “theory of three harmonies” (heping, hejie, hexie), that some key terms of clear Confucian connotations are incorporated into the official ideological discourse (...). The “socialist harmonious society” has gradually taken a leading role between 2004 and 2007.» The abovementioned Resolution has even been understood as «the most important milestone of China’s Harmony Renaissance» that some observers trace back to the 1958 Manifesto on Chinese Culture to the Scholars of the World (Wei Zhongguo wenhua jinggao shijie renshi xuanyan), offering New Confucianism as a key contribution to world harmony. In Mainland China, many intellectuals have since dwelled on the concept of hexie. The hexie shehui policy is all the more interesting, from the global perspective, given that ‘harmony’ has been viewed as one of the most valuable elements of Confucian heritage; e.g. for Kang Ouyang, it is about «harmony among peoples, insofar as harmonious relationships between human beings is to be based on the common understanding of virtues.» Even more explicitly, Wang Hui, an important leftwing intellectual affirms that «most Chinese intellectuals understand globalization within the context of the Confucian ideal of universal harmony.» So, why would not the hexie shehui policy offer a framework for the problem setting of a global harmony?

3.3. Understanding Western Reluctance

In the overwhelmingly majority of cases, Western legal scholars are unwilling to recognize the legitimacy of the notion within contemporary theory of law. A quick look at indexes in some of today’s most used textbooks demonstrates this by absence of reference.

While Chinese thought seeks for continuity throughout four millennia, modern Western political and legal thought increasingly pulled up the idea of harmony, in parallel with its embracing of individualism; a change of view ultimately dependant on the relationship between law and morals. There seem to be two well-rooted reasons behind Western reluctance.

3.3.1. Two Reasons

First, harmony is held to be intrinsically linked to a strong metaphysical stance, ultimately implying a world order that cannot be rejected on empirical grounds, let alone scientifically proven. This line of argument is connected to the legal positivist’s objection: Harmony is a notion borrowed from the iusnaturalistic tradition; i.e., it amounts to natural
law-talk that suffers, ultimately, from abusing Hume’s principle. The second line of argument can be referred to as the criticism of the liberal democrat: Let aside the epistemological and theoretical nature of the concept, in the realm of practical reason harmony implies an essential (and fix) hierarchy of people that will inevitably lead to autocratic political regimes.

In order to support these objections, it is enough to remember how the reference to harmony – like the thread of Ariadne – stretches through Western cultural history from the Pythagoreans who stipulated world harmony in a way that survived in Plato, Ptolemy, Cicero, Kepler, and Athanius Kircher down to the ‘pre-established’ harmony in the German lawyer and philosopher Wilhelm Gottfried Leibniz. The main reason why Western thought moved away from this universal harmony can be attributed to the «process of (...) secularization» and «the growth of analytical rationalism and segmentary, fragmentary, materialistic and positivistic view of the world.» 39 Universal harmony, in stark contrast to the autonomous realms of knowledge typical of modern science, was indeed comprehensive: The scala naturae of natural order, that social order was but to emulate, was grounded in the principle of plenitude, continuity and the principle of sufficient reason. 40 Therefore, it is not surprising that harmony has been connected to Natural law theories in the Western tradition. In the words of the most famous advocate of pre-established harmony, Leibniz: «Perfection is the harmony of things, or the state where everything is worthy of being observed, that is, the state of agreement [consensus] or identity in variety.» 41 Harmony seems to imply the existence of a natural order that is in itself complete. The variety of existence as such has an inherent and supreme value that law must succour.

The emulation or mimesis of the scala naturae in the realm of social relationships is the other reason why Western thought turned away from harmony: It implied an immutable hierarchy between all individuals (i.e., principle of gradation). Non essent omnia, si essent aequalia (De div. nom., IV, 10) – If all things were equal, all things would not be: The six word epigram of Augustine is clear. «A rational world then (...) must exhibit all degrees of the imperfection which arises from the specification of differences among creatures through distinctive limitations. It is therefore absurd for man to claim more qualities than he has received.» 42

The Chain of Being defines man’s place in the cosmos with precise psychological, moral and even political implications; e.g., in the Enneads, Nature’s intrinsic harmony is allegedly sufficient reason to conclude: «The cities which have the best governments are not those in which all citizens are equal.» 43 This hierarchy leaves the individual with a residual ‘liberty’ of merely accepting one’s role in this great scale; a view of freedom that famously left Voltaire baffled. This hierarchical element ultimately contrasts with modern Western legal thought which is grounded in ethical individualism and on the assumption of human beings as free moral agents. The claim is that the introduction of the concept of harmony – jeopardizing the hypothesis of the state of nature in the logic of the social covenant – will inevitably lead to authoritarian political models: The harmonious order does not take controversy seriously. Rather, it implies elimination of conflict within society; contradictions have to be eradicated or hidden in order to promote (apparent) stability. Harmony would then only amount to a cover-up status qvo, based on manufactured consensus.

3.3.2. Harmonious Policy Making at Odds with Western Thought

We are now able to grasp what features of the Chinese ‘harmonious society’ are at odds with modern Western thought. The potential hypostatisation of harmony is a source of (cultural) antagonism. Two aspects of the current hexie shehui policy should thus be stressed:
First, law is conceived to be the framework within which morality can bloom.\textsuperscript{44} It is in such a context that we should place Hu’s list of \textit{Eight Honours and Disgraces}, as well as the identification of many new ‘moral models’. The procedural aspects of law, as a set of formal rules, would not be sufficient without the stronghold of morality that can only grow out of appropriate education. «We are here at the heart of a theoretic framework that makes law the principle of discipline for erecting morals in society.»\textsuperscript{45}

Hence, the first aspect that makes Western legal thinkers suspicious is that harmony has a \textit{substantial} and not merely \textit{procedural} element: If we think of social interaction in terms of harmony then «rather than a neutral state, the Party in its role as vanguard sets the normative agenda for society.»\textsuperscript{46} Whereas Western liberal constitutions, reflecting their origins in Enlightenment theories of social contract, emphasise a limited government and separation between state and society, in the world based on ‘harmony’ – whether classical Western or contemporary Far Eastern – solidarity trumps individual freedom. Society legitimately sets the moral agenda.\textsuperscript{47} This in turn, it is feared, entails many ‘pre-modern political elements’ as the priority of duties over rights, and the supremacy of the collective (family, community) over the individual. Unsurprisingly, some observers of the \textit{hexie} policy claim that «the avoidance of conflict through moral discipline belongs to a pre-political vision of modernity.»\textsuperscript{48}

A second aspect that disturbs many Westerners in the Chinese insistence on harmony is the reliance on informal mechanisms for resolving disputes.\textsuperscript{49} The insistence on \textit{mediation (hejie)} is often associated with harmony: A progressive slip towards mediation for conflict resolution as a substitute of lawsuits has been taking place. This procedure is conceived as alternative to dispute resolution in courts, and especially in relation to administrative law.\textsuperscript{50} The cases mostly concerned by extrajudicial conflict-settlement are issues related to expropriation, pollution, and restructuring of state enterprises. The Supreme People’s Court has endorsed these harmony promoting practices.\textsuperscript{51} The main argument against these settlements is that «the conflict is here downturned or ignored to the benefit of a fiction of harmonious unity in a people held together by its common ideal of stability.»\textsuperscript{52}

Pushing for an extrajudicial resolution represents a step \textit{away} from the model of modern Western law as the key pacificator in society: Suffice to say that Locke’s introduction into his contract theory of the judge as the ‘impartial third party’ assures the exit from the state of nature and its downward spiral into open conflict. Moreover, the turn towards non-court mediation jeopardizes the ideal – central in many modern Western theories – of law as a tool for emancipation. Clearly in alternative dispute settlements, as in all informal negotiations, the risk is that the strong party will prevail over the weak because of structural inequality in pressure capability. Justice will then not be done, but an apparent harmonization will take place as the weak party draws back the charges.

4. Lessons to Learn

From what we have said, it shall now be clear that rule of law, ubiquitous in the Western tradition of justice, does not constitute a clear referent as far as institutional arrangements and legal rules are concerned. Essentially chameleonic, the rule of law is likely to be accused of covertly smuggling in values and to be all the more questioned by non-Westerners as it becomes a catchword. Conversely, harmony – although not essentially contested – is suspected of inadmissibility into (Western) legal discourse, because of historically profound reasons that are not likely to dissolve over night. Following Donald Davidson’s idea that a belief is identified by its location in a pattern,\textsuperscript{53} there is little hope that the notion of harmony, in Western legal thought, can be extrapolated from its metaphysical
set of correlated and outdated notions that made the Enlightenment refute it in the first place. None of the concepts can plausibly be the cornerstone of a 21st century shared legal framework.

This analysis seems to confirm the radical views in comparative philosophy that argue for methodological incommensurability, i.e., the view that the problems, basic concepts and modes of inquiry elaborated by one tradition lack meaningfulness in another. Grounded in the assumption that vocabulary, theoretical frameworks, let alone justificatory practices differ to such an extent that we are simply prevented from thinking outside our own tradition of thought, incommensurability implies that there can be no cross-traditional reference to a common subject matter or to widespread ways a topic has been theorized in different philosophical traditions. Luring behind is often defiance towards universal reason.

Notwithstanding these difficulties, there is a case for engaging in a de-provincialized discourse on the legal basis of the globalized world. Both ROL and harmony present significant features that should be applied for establishing preconditions of such an order. From the rule of law, we must hence learn again the fundamental lesson of impartiality as an indispensable element in applying the principle of justice. From harmony, we must refine our understanding of the complex ways in which social cohesion is enhanced and without which no order is sustainable.

The principle of impartiality, founded on the transitivity of the parties in a controversy, refers to their willingness to accept the unbiased sentencing of a third. The impartial judge is one of the few topoi that incessantly return in accounts of justice. However, it is not a trivial concept at all. As hard as it might be to disentangle impartiality from closely connected issues such as neutrality and disinterest, we need to rethink the momentum and institutional contents of impartiality in replacement for the current extension of the list of goodies associated with ROL (cf. 2.2).

This insistence on impartiality as unbiasedness is not only constitutive of Western legal thought – from the Romans until today but of Chinese philosophy as well. Here some brief quotes from the Confucian tradition are sufficient to make the point. For Kongzi, the equanimity of the exemplary person (jūnzi) is opposed to lì, biasness and excessive partiality. That is why, following the Analects, «in the world, the jūnzi is not for or against anything. What is right – this is what he accords with» (4.10). An essential element of impartiality is the transitivity of the parties based on shū, “sympathetic understanding” or “reciprocity.” Thus the jūnzi “associates openly with others” (zhōu) and is not partial or one-sided (bū bì), where zhōu, “associating openly” refers to the ability to “take a wider view” or “keeping the public good in mind.” In order to do so the impartial third «carefully examine[s] the words and demeanour of others, and always take[s] the interests of their inferiors into account when considering matters.» Kongzi noted that «the jūnzi cherishes [the fairness associated with] punishments, whereas the petty person cherishes exemptions.»

I do not aim to show that it would be impossible to appreciate these aspects without comparing accounts from different philosophical traditions, but rather that we do appreciate them as a result of a careful comparative study.

The second lesson we need to learn involves harmony and concerns the relation between the parts and the whole and more specifically the crucial role played by social cohesion, enabling integration of all members into society.

The charge against Western (rule of) law has often been its individualism: the Lockean ‘owner-focused individualism’ and the Weberian ‘methodological individualism’. Against the first, it is held, and not without reason, that it would not emancipate the individual from the crude and miserable struggle for life that so many put up with everyday. Against the dominant outlook on human interaction in economic and social sciences, it is held that it tends
to disregard, in explaining preferences, collective phenomena that cannot be explained on the basis of individual choice as in the case of language and, to certain extent, law.

Without falling into the opposite trap of holism and organicism, the current emphasis on harmony offers the *occasio*, if not the *ratio* for rethinking the ‘reunion’ of the individuals within society. Harmony is of interest because it may shed new light on what has been called “democratic individualism”:

There is the individualism of the liberal or libertarian tradition, and there is the individualism of the democratic tradition. The first form of individualism cuts the string between the individual and the organic society and sets him outside the motherly womb (…). The second form of individualism unites him with others; individuals similar to himself, that he considers his peers, so as to recompose society through their union; no longer as the organic whole from which he left, but as an association of free men. The first form of individualism calls for the individual’s freedom from society. The second form calls for a reconciliation between the individual and society, turning the latter into a voluntary agreement among free and intelligent human beings.

A road map toward a non conflict-ridden globalized world needs therefore to include renovated and insightful reflection both on the principle of impartiality and the integration of free men and women in society. A theory aimed at founding anew the conditions of peace must start from these premises if it wishes to overcome the divides between East and West and think out of the box. Given the quagmires currently afflicting rule of law, it is necessary to return to the principle of impartiality as the founding principle of all and every institutional arrangement for future global justice. Serious attention has also to be devoted to the reconciliation of individuals and society, the requirements of social cohesion indispensable for whatever order, and distinctive of well-ordered societies. In other words, the principle of impartiality and societal integration can be considered necessary conditions in disjunction, and perhaps even sufficient reasons in conjunction for setting, if not the institutional arrangements, at least the cultural preconditions of the legal order for the coming of age of the global society.

In order to flesh out such a possibility, we need to prompt reflection on a *world theory of justice*, building on a broader cultural and philosophical scholarship than simply home-grown. If the purpose of theory is to frame research agendas, to direct empirical research to interesting developments, and to offer comprehensive generalizations, my claim is that to ideate a positive research agenda we need to move towards a transnational and cross-cultural redefinition of justice. Very few attempts have been made. Yet the primary scholarly challenge today – it seems to me – is to sketch out such a discourse in contemporary legal theory, in order to capture the big picture, and allow theorists to make sense of what has been achieved thus far.

Any thoughts?

---

**ENDNOTES**

1. As developed by the Italian legal theorist Norberto Bobbio, conceptual analysis must be coupled with the attention towards real world factors (*Teoria generale della politica*, Einaudi, Torino 1999, 39).
2. This paper uses the *pinyin* system of Romanization of Chinese. Ideograms have been generally avoided for the benefit of the English-speaking reader. The same choice, which is practical but discussable, has been applied to ancient Greek terms where I use the Oxford standard transliteration system.
3. This classical *topos* was developed in Plato’s *Statesman*. See *Platonis Opera*, ed. John Burnet, Oxford University Press, Oxford 1903, 294a (here in Benjamin Jowett’s trans.): The Stranger, says «in a sense, however,
it is clear that law-making belongs to the science of kingship; but the best thing is not that the laws be in power, but that the man who is wise and of kingly nature be ruler." The English formula is from *Encyclopedia Britannica* (Edinburgh 1771). More conventionally, «a government of laws and not of men» is from *Marbury vs. Madison*, 5 US 137, 163 (1803).


The opposition builds on Bernard Williams’ distinction between thin/thick conceptions (originally elaborated within moral philosophy and in contrast to non-cognitivism). But it is also reminiscent of the opposition between procedural and substantial democracy that responds to a long line of though in political philosophy that I shall not comment on here. For a discussion of the pros and cons of the formal approach, see Robert S. Summers, *A Formal Theory of Rule of Law*, *Ratio Iuris*, 6:2 (1993), 127-42.


Karl Polanyi, *The Tacit Dimension*, Peter Smith Publisher, Magnolia 1983


loc. cit., 12-14

loc. cit., 1


Global constitutionalism makes the (descriptive) claim that there is already an embryo of “global constitution” emerging chiefly from international charters such as the 1945 UN Charter, the 1948 *Universal Declaration of Human Rights*, the 1966 *International Covenant on Economic, Social and Cultural Rights* along with

22 The expression coto vedado or prohibited territory, indicates the sphere of policies that are off-limits for collective decision-making and concerns fundamental rights. The formula was coined by Ernesto Garzón Valdés who drew the inspiration from Juan Goytisolo: Algo Mas Acerca del Coto Vedado, Doxa, 6 (1989), 209-218.

23 There are various versions of this outlook, e.g. for Habermas, the organizing, sanctioning and executive powers of the constitutional state are «not just functionally necessary supplements to the system of rights but implications already contained in [these] rights» (Between Facts and Norms, Polity Press, Cambridge 1996, 134. See also The Divided West, Polity Press, Cambridge 2006; cf. the special issue of the German Law Review on The Kantian Project of International Law, 2009:1. The Italian scholar Luigi Ferrajoli has elaborated a systematic framework for the claims of global constitutionalism, making the case for the “constitutionalisation” of social rights and public goods: Principia iuris. Teoria del diritto e della democracia, Laterza, Roma 2007, vol. I-II.

24 Peerenboom (note 11), 9.

25 The Chinese character for harmony, he, (和) that gives harmony, hexie (和谐) consists of two components, i.e. mouth and millet, evoking the idea that everyone has food to eat; where the xie (谐) character indicates that there are words to speak one’s mind.

26 Confucians in particular emphasized the single-character term he, which appears in all of Confucianism’s Five Classics and three of the canonical Four Books. The most forceful articulation of this concept of personal and collective harmony can be found in the Doctrine of the Mean, defining harmony as a state of equilibrium. In the Analects, Kongzi insists that «with equality, there is no poverty; with harmony, there is no scarcity; with security, there is no rebellion.» (Confucian Analects, The Chinese Classics, trans. by James Legge, vol. I, Dover Publ., NY 1971). See also Roger T. Ames, Henry Rosemont, The Analects of Confucius: A Philosophical Translation, Ballantine Books, New York 1998.

27 The width of meanings that have been associated with the term harmony in Western thought is strictly correlated to cosmologic speculations of the so-called Pythagoreans from the 6th century BC who developed a numerical representation of the universe.

28 Harmony came to represent the art of combining simultaneously different sounds. Until the 4th century AD it was still a speculative term. It entered the technical vocabulary of music only after the work of Jean Tinctoris and Franchino Gaffurio.


30 The term xiaokang shenhui is inspired by Confucius and goes back to the Evolution of Rites (Liyou) and the Book of Rites (Liji) where three ages are distinguished: The golden age of Datong, the current age of troubles and in-between xiaokang as «the period of minor peace» (trans. by Yutang Lin, The Wisdom of Confucius, Random House, New York 1943, 158).


New-Confucianism (Xiantai Xinxue) is different from the much more restrictive Neo-Confucianism (Dangdai Xinxue), the philosophical movement initiated by Xiong Shili.


There is, of course, abundant literature suggesting that incompatibility between Chinese harmony and Western legal and political liberalism is based on the reference to democracy, human rights, and rule of law. Such material has been disregarded because it uses immediately normative definitions of democracy and rule of law that would require further deepening if they are to avoid the suspicion of being construed *sic et simpliciter* against “Oriental despotism”. In my opinion, there is no particular interest in stopping at the first level of analysis by registering that we are confronted with different and opposed normative discourses.


Gottfried W. Leibniz, Philosophical Essays (trans. by Roger Ariew and Daniel Garber), Hackett Publishing Company, Indianapolis (IN) 1989, Letter to Christian Wolff on the 18th of May 1715, 233-4

Lovejoy (note 39), 65

*Enneads*, VI, 6, 17-18; R. Volkmann (ed.), Teubner, Leipzig 1884, II, 176

Recent debates within the Congress and elsewhere confirm the crucial connection between law and morals in the call for a combination of government by law (yi fa zhi guo) and government by virtue (yi de zhi guo). In 2002, a Citizen’s Code of Conduct was adopted through which Zhu Rongji hoped people would develop “basic virtues” like courtesy, honesty, solidarity, friendship etc.


It should be noted that the notion of “harmonious society” has appeared in law-related debates also in the West: *e.g.*, the Alternative Dispute Resolution movement has been presented as a harmonizing remedy against the “excesses of litigation.”


The Supreme People’s Court issued *Opinions* in January 2006 with recommendations on the role of the judiciary in the construction of the “harmonious society” and two notices were published in March 2007 on the “positive role” of mediation in conflict resolution. It has been suggested to me by Alessandro Ferrara that a “Western” counterpart that would deserve our attention is the institution of the EU ombudsman.

Choukroune, Garapon (note 44), 48


Many terms in classical Chinese have a broad semantic range and their significance is rather context-related; here it is enough to say that it is not mere “greed” but means to covet something in an unjustifiable measure, comparably to the Greek term peleuxia.


Kongzi (note 25), 12.20

Kongzi (note 25), 4.11. Zhu Xi comments on this passage referring to the public dimension of the jūnzǐ’s interest as opposed to the private dimension of the interests of the petty person: *Collected Commentaries on the Four Books*, Hunan Sheng Xinhua Shudian, Changsha 1985, 170.

Bobbio (note 1), 334


Patricia Mindus
Department of Philosophy, Uppsala University
Box 627, 751 26 Uppsala (Sweden)
Dipartimento Studi Politici, Università di Torino
Via Giolitti 33, Torino (Italy)